90-1607

Supreme Court, U.S.
F I L E D
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No.____

IN THE

Supreme Court of the United States

October Term, 1990

SCOTT MANATT,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION FOR REVIEW

DID THE COURTS BELOW ERR IN HOLDING THAT, UNDER *LANGLEY V. FDIC*, 484 U.S. 86 (1987), 12 U.S.C. §1823(e) REQUIRES THAT A WRITTEN LIQUIDATION AGREEMENT FOR COLLATERAL MUST BE EXECUTED AT THE TIME THAT A PROMISSORY NOTE IS FIRST EXECUTED AND THAT THE AGREEMENT MUST BE RECORDED IN THE BANK AT THE TIME OF CLOSURE?

A. DOES EXECUTION BY MEMBERS OF THE LOAN COMMITTEE AND THE DOCUMENT ITSELF MEET THE RECORD REQUIREMENT OF §1823(e)?

B. DID THE LOWER COURTS ERR IN ALLOWING THE FDIC TO KEEP ALL THE BENEFITS OF THE WRITTEN AGREEMENT WHILE WAIVING ALL RESPONSIBILITY UNDER THE AGREEMENT?

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TO THE HONORABLE THE CHIEF JUSTICE
AND THE ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Manatt v.*

FDIC, 922 F.2d 486, filed January 3, 1991. It is reprinted at page A-1 of the Appendix.

The Eighth Circuit affirmed the ruling of the United States District Court for the Eastern District of Arkansas, which was issued May 25, 1988 and which is reported as *FDIC v. Manatt*, 688 F.Supp. 1327. It is reprinted at page A-12 of the Appendix.

JURISDICTION

This Court has jurisdiction and jurisdiction should be invoked under the provision of Rule 10.1(c) in that the United States District Court and the Eighth United States Circuit Court of Appeals, now being appealed, has decided a federal question in a way that conflicts with the applicable decision of this honorable Court, specifically in terms of the application of *Langley v. FDIC*, 484 U.S. 86, especially in the area of defining the term "contemporaneously with the acquisition of the asset by the bank" as same pertains to a mutual liquidation agreement. This petition is taken from the entry of a judgment of the United States Eighth Circuit Court of Appeals filed January 3, 1991, now reported as *Manatt v. FDIC* 922 F.2d 486, same being the appealed decision of *FDIC v. Manatt*, 688 F.Supp. 1327. The case further specifically involves the question of both terms used and application of *Langley* as applied to 12 U.S. Code §1823(e) 1, 2, 3 and 4 and as applied in this appeal and as differentiated in the matter of *Langley v. FDIC. supra*. No petitions for rehearings or extensions have been requested or granted.

STATUTORY PROVISIONS

12 U.S. Code §1823(e) provides as follows:

No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously, from the time of its execution, and official record of the bank.

STATEMENT OF THE CASE

The question for review in this matter is the treatment of the U.S. District Court for the Eastern District of Arkansas and the Eighth Circuit Court of Appeals of the decision of *Langley v. FDIC*, 484 U.S. 86 (1987), as same applies under 12 U.S. Code §1823(e). Both the District Court and the Eighth Circuit ruled that a written liquidation agreement for collateral must be executed at the time that the Promissory Notes were first executed and also that same must be a recorded record in the bank at the time of closure. The document itself with bank seal

affixed approved and signed by the bank president, cashier and vice president (members of the loan committee), the defendant Scott Manatt and the non-debtor Sharon Manatt and transfer of all collateral assets referenced within said document was deemed not sufficient compliance with §1823(e) as to discharge the unrelated Scott Manatt from liability on notes to the bank with the liquidation contract or agreement having been executed six months prior to the closing of the bank, and allowing the FDIC to accept all the benefits of the agreement (meaning conveyances of land, airplane and secured note) but not accept or be subject to any contract conditions or obligations. The issue is whether this result and treatment is allowed under *Langley*, supra, in construing 12 U.S.C.A. §1823(e) 1, 2, 3, and 4. The court further held that accord and satisfaction did not occur as a result of said agreement. The courts and each of them erred in giving an inordinate amount of consideration to the association of the non-adopted, non-director attorney not on retainer who had been raised by the family but only had a lawful name change with the result being that §1823(e) was construed in such a manner as to change the standard and burden of proof needed to sustain the agreement.

This appeal is taken for Writ of Certiorari based upon original jurisdiction having been taken by the United States District Court for the Eastern District of Arkansas and then the Eighth United States Court of Appeals based upon Federal jurisdiction having been acquired in the first instance in the matter involving the FDIC acting in a corporate capacity under 12 U.S. Code Annotated §§1821(e) and 1823(c)2(a) which the

FDIC, acting in its corporate capacity purchased some assets from the Corning Bank and also jurisdiction under 12 U.S. Code Annotated §§1823(e) 1, 2, 3, and 4 and thereby having original jurisdiction involving a federal question.

The jurisdiction of the United States District Court was invoked on grounds that the case arises under the laws of the United States pursuant to 12 U.S.C. §1819 and 28 U.S.C. §1345. The jurisdiction of the court was invoked pursuant to 28 U.S.C. §1291 in that this was a final decision of a U.S. District Court.

This case involves a series of seven Promissory Notes executed only by the defendant, Scott Manatt, and not executed by the wife of the defendant and non-party and perhaps indispensable party to this action well in advance of the date of the "mutual agreement for liquidation of collateral" (a signed written agreement), which agreement was executed six months prior to the date of closing of the Corning Bank, Corning, Arkansas. The mutual agreement for liquidation of collateral (Appendix, p. A-31) was executed by two members of the loan committee of the Corning Bank and had thereon the seal of the Corning Bank placed thereon by the custodian of the seal, a third member of the loan committee through which all the debts of Scott Manatt identified by note number, date and amount would be liquidated in consideration of a surrender of collateral and a transfer of collateral by Manatt and the non-debtor, non-party Sharon Manatt as her interest may appear as the wife. That Sharon Manatt, not being indebted to the Corning Bank in any amount of money,

executed said agreement on January 5, 1984, six months prior to the closing of the Corning Bank and several months or years after the notes were executed by Scott Manatt. It is undisputed that all properties set forth in said agreement to be conveyed to the Corning Bank were in fact conveyed to the Corning Bank on said date, including the interest of Sharon Manatt. That the Corning Bank and or the FDIC received all the benefits of the voluntary conveyances of both real and personal property and further sold or disposed of the property therein conveyed without any other or further notice to Scott Manatt. That the Federal District Court ruled that in order for the mutual agreement for liquidation of collateral to be valid that same must have been of record at the time the Promissory Notes were executed, which would have been an impossible circumstance in that Sharon Manatt **owed nothing** and did not execute or sign or otherwise become liable on any of the Promissory Notes. That the District Court further held that said agreement was not recorded in the Minutes except by some vague reference, approving agreements but not by name. That the agreement itself was executed by two members of the loan committee of the Corning Bank, same being the President, the Vice President and the custodian of the bank seal attached to same. That the provisions of §1823(e) provide for said agreements to be in the minutes of the bank **or in the loan committee minutes,** (emphasis added) the document itself being the best evidence of said minutes, the bank's copy was in the bank.

12 U.S.C. §1823(e) provides as follows:

> No agreement which tends to diminish or defeat the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously, from the time of its execution, an official record of the bank.

That the 8th Circuit ruled that same must be a recorded document and that recordation must occur prior to the bank being taken control of. Nowhere in said federal statute does it call for a recordation but simply that same must be in the minutes or an official record of the bank. That the Court has wrongly concluded that this Appellant, Scott Manatt, while not related by blood or adoption, is equitably related to the Manatt family within the necessary degree of consanguinity and was an attorney and that Scott Manatt and Sharon Manatt borrowed the monies, all of which factual statements are not supported by the record. That the innuendo and misstatements have created a greater burden of proof and have shifted the burden of proof from the FDIC to the Defendant Manatt

to disprove every fact, thing and circumstance that the FDIC should maintain as to these notes. That all of the proof, which is mainly undisputed in this cause, is construed most strongly against Manatt based upon the imputed relationship and in derogation of the rights of Sharon Manatt, a non-party to this action and non-debtor as to the Corning Bank and rewrites an otherwise valid contract of accord and satisfaction to the detriment of Scott Manatt with the FDIC taking all of the benefits of the contract but not any of the responsibilities. That the Court has erred in applying *Langley v. FDIC* in creating an impossible standard of performance and by creating an enhanced standard of responsibility as to the debtors reaching agreements in satisfaction of debt.

REASONS FOR GRANTING THE WRIT

Scott Manatt respectfully submits to this Court that the decision of *Langley v. FDIC*, 484 U.S. 86, in which a contemporaneous requirement of §1823(e) was construed has been challenged as being erroneously applied both in the United States District Court for the Eastern District of Arkansas and in the Eighth United States Circuit Court of Appeals. It appears that in both cases the Court has ruled that a written and signed mutual agreement for liquidation of collateral must have been executed at the same time that the promissory notes were made and the funds advanced. Specific and concurring opinion by the Honorable John R. Gibson especially concurs with same. The lower court expressly held as a matter of law that the mutual agreement was insufficiently

recorded in the Minutes of the Bank Board of Directors to satisfy §1823(3). Manatt respectfully submits to this honorable Court that (1) the minutes therein did reflect that some approval was had, but further Manatt respectfully draws the Court's invited attention to the provision of §1823(e) reading, "shall have been approved by the Board of Directors of the Bank **or its Loan Committee** [emphasis supplied] which approval shall be reflected in the minutes of said Board **or Committee.**" Manatt respectfully submits to this honorable Court that a signed original of this document, the Mutual Agreement for Liquidation of Collateral, attested by the President of the Corning Bank, the Vice President of the Corning Bank, the Cashier of the Corning Bank and with the bank seal affixed, all of which having been executed by three members of the loan committee of the Corning Bank, Corning, Arkansas and maintained a copy thereof in the Corning Bank is more than sufficient to meet the recordation if same should be required and that said §1823(e) does not require any **specific** method of recordation but only that same be an official record of the bank, the document itself being the best evidence of the record. The document being in the bank, Manatt would respectfully submit that under §1823(e) every fact, thing and circumstance therein set forth as required is met. Manatt respectfully submits to this honorable Court that, but for the relationship and the last name change of Manatt and the change of name not being related within the fourth degree of consanguinity and not being an attorney on retainer of the Corning Bank that there is some reference to insider knowledge by association by innuendo or other improper suggestion.

That §1823(e) does not so provide and that same is an unfair characterization as was set forth at Page 1 of the lower court's opinion, the reference to Manatt being a lawyer and a stockholder, testimony having indicated that Manatt owned less than one and one-half percent of the stock of the Corning Bank, same being 165 shares out of some 16 to 20 thousand shares of stock and further, the testimony was undisputed that Manatt was not on a retainer but only worked on the Corning Bank on those matters from time to time as was requested and further that said Manatt was not an officer or director of the Corning Bank. The record further indicates that Manatt was not adopted by the Manatt family but only changed his name at time when a West Point nomination was being sought for the purpose of entry into the military service. (Manatt not having attended the academy but later having obtained a military commission, served two years as an officer in the armed forces of the United States under said name.)

Manatt respectfully submits to this honorable Court that but for the name identification and his relationship as an attorney, this matter would be a proper matter for Rule 11 sanctions if maintained on a contract basis elsewhere and between private litigants.

Manatt respectfully submits to this honorable Court that there is no basis in law or fact as between private litigants and without the benefit of §1823(e) in which this result could be achieved. The sole and only issue before this honorable Court is the question of whether or not §1823(e) sufficiently reworks contracts and sets a standard or benefit to the

FDIC to the detriment of parties reaching mutual agreements for liquidation of collateral as in this case at bar. Manatt has raised the questions of estoppel, estoppel by deed, *res judicata*, waiver and collateral estoppel based upon the fact that all of the collateral set forth in the mutual agreement for liquidation of collateral was delivered and transferred to the Corning Bank and acted upon by the Corning Bank for a period of six months in advance of the time that the Corning Bank was taken over by the State Bank Commissioner and then placed in the hands of the FDIC. The properties as acquired by the bank on January 5, 1984 were sold in part by the Corning Bank and then by the FDIC, as testified by the FDIC, at private sale without notice to Manatt.

That at no time did the Corning Bank or the FDIC ever tender or offer or otherwise advise Manatt of any rights in and to the collateral nor did they ever at any time offer Manatt an opportunity to be placed back in his same position prior to the mutual agreement for liquidation of collateral. That at no time was Sharon Manatt ever a defendant in this action **nor was Sharon Manatt ever a debtor** to the Corning Bank. She owed the bank **nothing.**

That the FDIC, through the provisions of §1823(e) has claimed and maintained and acted upon all of the benefits of the contract and accepted none of the liabilities. That Sharon Manatt, a non-party, is a third-party beneficiary (not yet raised) and an indispensable party, but also a non-signatory to the debt instrument. That the question of a contemporaneous

execution as to Sharon clearly is not logical and in no event could the FDIC have received the dower interest of Sharon Manatt at the time that the debt instruments were executed in that Sharon Manatt was not a party to the debt instrument and did not sign the note or any of them. That Sharon Manatt not being a party, the Congress clearly indicated that the contemporaneous question involved the question of the time the agreement was entered into, which was January 4, 1984 and that consideration be therein set forth, which it was done in this case. That Manatt respectfully maintains to this honorable Court that under the provisions of §1823(e), all the provisions, including the contract being in writing, contemporaneously delivered and the elements therein stated, were fully, finally and totally performed.

Manatt respectfully submits to this honorable Court that Manatt does not have access to the internal books, records and files of the Corning Bank and that to hold Manatt to a standard as to what is in the Minutes beyond that over which he has control, meaning the document execution and delivery to the bank, is an unfair and unfounded result. That the very purpose of the document was to stop agreements that may be used to defeat or diminish the interest of the FDIC the purpose being to control "secret agreements." This agreement was never secret, was executed by three top management officials, the debtor Scott Manatt and the non-debtor Sharon Manatt, and had the bank seal thereon placed. The lower court apparently makes some reference to the question of

an extinguishment of a debt based upon one set of numbers. Again there is very little or no proof in the lower court record except that Manatt gave, according to his testimony, much more than the $136,000.00, meaning the $50,000.00 Promissory Note later discharged in bankruptcy, but nonetheless secured by real estate which became a full asset of the Corning Bank, the 24 lots that FDIC disposed of for $24,000.00, according to the record, several years after the closing of the Corning Bank and after a major change in land prices; Scott Manatt testified as owner that the reasonable value of the lots in a prime subdivision to the city of Corning, Arkansas with fire protection was between $240,000.00 and $300,000.00 with a tax basis or cost basis as reported at $179,000.00. A Piper Cherokee Airplane which had a value estimated at $22,000.00 plus attorney's fees as were set forth and acknowledged as Exhibit "19" (as extracted from the FDIC report) at the lower court of not less that $100,000.00 and testified to extensively by Manatt.

The question of who gets the best and the worst of a deal in an accord and satisfaction is no concern. The sole and only question for this honorable Court is whether or not consideration was given in exchange and simultaneously. Again, we go into the very heart of the question of §1823(e) and whether or not the shield statute of the United States is used in such a way as to work a hardship and a detriment on the debtors who are entering and executing agreements and whether or not these hardships and agreements defeat the rights of third-party beneficiaries

under the contract and whether or not there is any security in dealing with banks now or ever, whether or not the standard or burden of proof is a greater standard or burden of proof based upon the appearances within society of a minority stockholder.

Manatt would respectfully submit that at no time was there a suggestion of impropriety in the course of this trial and at no time was any evidence supported or presented during the course of this trial, that Manatt had any inside information and had done, performed or acted in any way other than as set forth in the trial transcript and now the appellate brief.

Manatt respectfully submits to this honorable Court that the provisional remedies of 1823(e) were designed to shield the interest of the United States and protect the interest of the United State against secret agreements. That a secret agreement was an agreement designed to defeat the rights of the United States based upon coverup, concealment or some other unrecorded and unknown document. This document was in writing, fully executed, fully performed, the benefits of the bargain were obtained by the FDIC, acted upon by FDIC and disposed of by the FDIC, all without the acquiescence, control, benefit or knowledge of Scott Manatt or the non-debtor defendant, Sharon Manatt.

Manatt would respectfully submit, to the Court that the *Langley* ruling, *supra*, was based upon an outside agreement occurring at the time that the notes were executed as an inducement to purchase land. This case is different from *Langley*, *supra*, in that,

in this case the notes had been in existence for several years paid on, refinanced and the agreement to liquidate the collateral and satisfy the debt agreed to at a far later date in writing and signed by everyone concerned with full performance and new consideration or certainly the consideration given in fee of the non-debtor wife of Manatt. Manatt respectfully submits that an officer may bind a corporation and here one had three members of the loan committee and the seal of the corporation.

WHEREFORE, Scott Manatt and Sharon Manatt respectfully request that this honorable Court undertake to review the facts and circumstances herein and determine whether or not these matters have been disposed of in a matter consistent with the Court's prior ruling in the *United States v. Langley*, 484 U.S. 86, and a further determination that the petition for certiorari should be granted to enable the Court to review the treatment of the Mutual Agreement for Liquidation of Collateral under 12 U.S.C.A. §1823(e) 1, 2, 3, and 4, the sum and substance of same being a part of the loan committee records and files and the magnitude and extent to which these records and files would be required to be maintained and whether or not there was an innuendo of a "corruption of the blood" by reason of the appearance of a change of name. Manatt respectfully submits to this honorable Court that certiorari should be granted and that but for the grace of God and consideration of this Court as a former Chief Justice of this honorable Court stated, "We are not right because we are infallible, we're right because we're last." And but for the action of this Court in grant-

ing this petition for writ of certiorari, this judgment rightly or wrongly but nonetheless devastatingly remains against Scott Manatt under a shield statute of the United States and clearly raises the question, "does the King err?"

Manatt respectfully submits further to this honorable Court that by reason of personal finances and inabilities, this appellate brief and petition for certiorari is filed pro se.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2290EA

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY,

Appellee

v.

SCOTT MANATT,

Appellant

Appeal from the United States District Court
for the Eastern District of Arkansas

Submitted: April 11, 1990
Filed: January 3, 1991

Before JOHN R. GIBSON, Circuit Judge, and FLOYD R. GIBSON and HENLEY, Senior Circuit Judges.

FLOYD R. GIBSON, Senior Circuit Judge.

Scott Manatt, a lawyer for and stockholder of Corning Bank of Corning, Arkansas, borrowed $387,266.02, from the bank between December 1980 and October 1983. On January 5, 1984, Manatt, his wife, and Corning Bank entered into an agreement under which Corning Bank purported to extinguish Manatt's indebtedness and Manatt, in return, transferred property to the bank. The FDIC, acquired among other things, seven Manatt notes, and subsequently attempted to collect on them. The issue in this appeal is whether the agreement absolves Manatt from liability to the FDIC on the notes.

We conclude that it does not and affirm the district court.[1]

I. BACKGROUND

Scott Manatt was a stockholder of Corning Bank and also served as its attorney from time to time. While Scott Manatt claims he is not related by blood to the Manatt family that owned and operated Corning Bank, that family did raise him and he shares the family name.

Between December 1980 and October 1983, Corning Bank loaned Scott Manatt and his wife, Sharon, $387,266.02 in exchange for seven promissory notes. The Manatts executed a mortgage on real estate as security for one of the notes and granted the bank a security interest in a 1966 Piper aircraft as collateral for another note.

On January 5, 1984, Scott Manatt, Sharon Manatt and Corning Bank entered into a Mutual Agreement for Liquidation of Collateral. James D. Manatt, president of Corning Bank, signed the Mutual Agreement on behalf of the bank. In the agreement, Scott and Sharon Manatt conveyed three items to the bank: (1) the real estate previously mortgaged as security; (2) the Piper aircraft; and (3) a promissory note, with a principal amount of $50,000.00 from Betty and Leon Eagan.

At the end of 1983, the FDIC began examining Corning Bank to determine its financial condition.

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[1]The Honorable Elsijane Trimble Roy, Senior United States District Judge for the Eastern District of Arkansas.

When the FDIC began its final examination on May 7, 1984, Manatt owed the bank $362,000 on the seven notes. Of that $362,000 the bank had charged off $242,000 and the FDIC examiners classified the remaining $120,000 as substandard.

On June 15, 1984, approximately six months after the Mutual Agreement was signed, the Arkansas Bank Commissioner concluded that Corning Bank was insolvent and ordered it closed. The FDIC accepted appointment as receiver of the bank under 12. U.S.C. Section 1821(e) (1988). As authorized by 12 U.S.C. Section 1823(c)(2)(A) (1988),[2] the FDIC, acting in its corporate capacity, purchased some of the bank's assets, including the seven promissory notes from Scott Manatt. At that time, the notes were still in the bank's possession and, despite the Mutual Agreement, had not been canceled.

The FDIC sold the collateral that Manatt had given the bank pursuant to the Mutual Agreement. The proceeds from these sales fell far short of the amount Manatt owed Corning Bank. Although the real estate secured a loan of $75,000, after deducting commissions and fees, the FDIC received only $22,848.96 when it sold the property. The Piper aircraft, which secured a note for $11,009, was sold for $7,000. The Eagans made payments totaling $5,371.90 on their promissory note, at first to the bank, and later to the FDIC. On October 14, 1984, how-

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[2] Section 1823 was amended on August 9, 1989, by Pub. L. 101-73, Title II §§201(a)(1), 217, 103 Stat. 187, 254. The current version can be found at 12 U.S.C.A. 1823 (1989 West). The amendments to subsection (e) were only changes in style and format and did not alter the substance of the statute. Throughout this opinion we refer to the 1988 version of the statute.

ever, the Eagans stopped making payments. They later filed for bankruptcy, and the bankruptcy court discharged the promissory note that the Manatts had assigned to Corning.

When the FDIC demanded that Scott Manatt repay the balance of the seven notes, he refused, claiming that the Mutual Agreement had extinguished his debt to Corning Bank. The FDIC then brought this action against Manatt.

The district court granted a partial summary judgment in favor of the FDIC. *FDIC v. Manatt*, 688 F.Supp. 1327, 1333 (E.D. Ark. 1988). Relying upon *Langley v. FDIC*, 484 U.S. 86 (1987), the district court first held that Manatt was precluded by 12 U.S.C. Section 1823 (e)(2), from relying upon the Mutual Agreement as a defense against the FDIC because the Mutual Agreement was not executed contemporaneously with the bank's acquisition of the promissory notes. *Manatt*, 688 F.Supp. at 1329-30. The court also suggested that section 1823 (e)(3) was not satisfied by the vague references to the Mutual Agreement contained in Corning Bank's board minutes. *Id.* at 1330. The court further held that the Mutual Agreement did not constitute a valid accord and satisfaction under Arkansas law because it provided for only partial payment of a liquidated claim. *Id.*

Alternatively, the court held that Manatt's defense was ineffective against the FDIC because the FDIC was a holder in due course. *Id.* In so holding, the court found that the FDIC purchased the notes in good faith and without notice of the Mutual Agreement. *Id.* at 1331-32. We need not decide this issue in light of our

holding today.

The court also rejected Manatt's arguments under the doctrines of estoppel by deed, equitable estoppel, res judicata, collateral estoppel, and waiver. *Id.* at 1332-33. The partial summary judgment did not resolve the question of whether the FDIC sold the collateral for a reasonable price. *Id.* at 1333.

After conducting a hearing, the court required the FDIC to give additional credit to Manatt for the collateral which the FDIC sold. *FDIC v. Manatt*, No. J-C-87-53, slip op. at 7-8 (E.D.Ark. June 16, 1989). The court also rejected Manatt's claim that the bank owed him money for legal work he performed before the bank closed. *Id.* at 8. According to the district court, "[t]he proof presented on this point failed to raise Manatt's claim to attorney's fees above the level of speculation." *Id.*

After adding interest, the district court entered judgment against Manatt for $505,595.33. *FDIC v. Manatt*, No. J-C-87-53 Judgment and Order (E.D.Ark. July 11, 1989). This appeal followed.

II. DISCUSSION

Manatt claims that the Mutual Agreement satisfied the requirement of 12 U.S.C. Section 1823 (e). Much of his brief is devoted to challenging the district court's interpretation of the contemporaneousness requirement of section 1823 (e) (2). Section 1823 (e) provides that:

> No agreement which tends to diminish or defeat

> the right, title or interest of the [FDIC] in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the [FDIC] unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be reflected in the minutes of said board or committee, and (4) shall have been continuously, from the time of its execution, an official record of the bank.

12 U.S.C. Section 1823 (e).

Manatt tries to use the Mutual Agreement to defeat the FDIC's right to collect on the notes it acquired from Corning Bank. To have such effect, the Mutual Agreement must comply with all the requirements of section 1823 (e) (3).[3] If the agreement fails to meet any one of

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[3] Contrary to the district court, we think that the Mutual Agreement between Manatt and the bank conceivably could have been an accord and satisfaction under Arkansas law. Though ordinarily a liquidated debt cannot be the subject of an accord and satisfaction as the district court concluded, Manatt, 688 F.Supp. at 1330 (citing Dyke Industries, Inc. v. Waldrop, 16 Ark. App. 125, 697 S.W.2d 936 [1985]), we read Arkansas case law to permit an accord and satisfaction where new and different consideration is accepted in fulfillment of a debt, though liquidated. Jewell v. General Air Conditioning Corp., 226 Ark. 304, –, 289 S.W.2d 881, 883 (1956); Lamberton v. Harris, 112 Ark. 503, –, 166 S.W. 554, 555-56 (1914) (accord and satisfaction existed where landlord acquired cotton in lieu of undisputed amount of rent). The Mutual Agreement may have been of this latter variety of accord and satisfaction; however, it was never completed. The seven notes were never canceled or returned to Manatt, thus the accord, if one at all, remained executory. See, General Air Conditioning Corp. v. Fullerton, 227 Ark. 278, 298 S.W.2d 61, 64 (Ark. 1957) (citation omitted). However, as in FDIC v. Krause, 904 F.2d 463, 466 (8th Cir. 1990) (avoiding need to interpret Iowa law of accord and satisfaction), we need not ascer-

the four requirements therein, the FDIC is not bound by the agreement. Though the district court only suggested it, *Manatt*, 688 F.Supp. at 1330, we expressly hold as a matter of law that the Mutual Agreement was insufficiently recorded in the minutes of the bank's Board of Directors to satisfy clause (3) of section 1823(e). The board minutes did not recite that the agreement was attached, or set out its terms, or even specifically refer to Scott Manatt. See *FDIC v. Kasal*, 913 F.2d 487, 490 (8th Cir. 1990) (loan agreements were "never . . . approved by the Bank's board of directors or loan committee, and never were maintained as part of the Bank's records"); *FDIC v. Krause*, 904 F.2d 463, 466 (8th Cir. 1990)("the agreement failed to meet at least one of the requirements—that approval by the board of directors or loan committee be reflected in the minutes of the board or committee"); *FDIC v. Gardner*, 606 F.Supp. 1484, 1488 (S.D. Miss. 1985) ("acknowledgment of the side agreement must be specifically reflected in the minutes of the board or committee"). Hence, we do not reach the contemporaneousness issue resolved by the district court, and, in fact, have serious misgivings about its interpretation of that clause.[4]

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tain Arkansas law in this matter because whatever the agreement between the bank and Manatt might have been if completed, it failed to comply with the recordation requirement of section 1823(e)(3). Once the FDIC stepped in, prior proper recordation of the agreement was necessary.

[4] While the district court held that the requirement in section 1823(e)(2) was not met, we are not so willing to embrace that view. We doubt that Congress intended that section 1823(e)(2)'s contemporaneousness requirement would defeat a valid accord and satisfaction entered into by a bank. Valid accord and satisfaction agreements are never contemporaneously executed with the initial documents in-

Finally, Manatt advances several other arguments that merit only brief discussion. He contends that the FDIC is precluded from avoiding the effect of the Mutual Agreement by the doctrines of equitable estoppel, estoppel by deed, waiver, res judicata, and collateral estoppel. Manatt, however, fails to identify any flaw in the district court's careful consideration of these doctrines. See *Manatt*, 688 F.Supp. at 1332-33. Accordingly, we are not persuaded by Manatt's challenges.

Manatt also argues that the FDIC did not obtain a reasonable price when it sold Manatt's collateral and that Manatt should have received a credit for the value of legal services that he performed for the bank. The district court made specific findings that are contrary to Manatt's contentions. Manatt has not even argued, let alone demonstrated, that the court's findings were clearly erroneous. See *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-76 (1985). Therefore, their contentions are untenable.

As indicated, we affirm the judgment of the district court.

JOHN R. GIBSON, Circuit Judge, concurring specifically.

I concur with the result the court reaches today and write separately only to express my view that the district court did not err in holding that the contem-

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curring the debt—the idea that they would be so executed is simply contrary to general business practice and to common sense. Surely Congress did not mean to preclude banks from getting something of value by an accord and satisfaction rather than nothing at all. But see Langley v. FDIC, 484 U.S. 86 (1987); FDIC v. Virginia Crossing Partnership, 909 F.2d 306, 309 (8th Cir. 1990). In any event, we leave the reach and scope of section 1823(e)(2) to another day, as an interpretation of that clause is not necessary to a decision in this case.

poraneous requirement of 12 U.S.C. Section 1823 (e) (2) was not met, and that Manatt has not established accord and satisfaction as an affirmative defense.

In ruling that the contemporaneous requirement was not met, the district court discussed the recent decision of the Supreme Court in *United States v. Langley*, 484 U.S. 86 (1987), as do both parties on appeal. The facts in *Langley* are different than those before us. In *Langley*, the appellants purchased real estate from a bank in exchange for a note. The appellants claimed that they were induced to buy the property by the bank's verbal misrepresentations about the amount and characteristics of the land it was conveying. 484 U.S. at 87 .

Langley's holding is narrow and is relevant only with respect to the contemporaneous requirement. In discussing section 1823 (e), *Langley* referred to the word "agreement" in the statute as meaning an agreement that is executed and becomes a bank record contemporaneously with "the making of the note." Id. at 92. The district court looked closely at *Langley* when determining that the contemporaneous requirement was not met.

The parties differ in their interpretation of the phrase "any asset" in section 1823 (e). Manatt would limit this phrase to the collateral he and his wife surrendered in the Mutual Agreement. Manatt argues that he, his wife and the bank signed the agreement contemporaneously with the transfer of title in the collateral to the bank, thereby satisfying section 1823 (e) (2).

The FDIC argues that "any asset" refers to the notes that it is attempting to collect. If the notes are

the "assets" in question, the contemporaneousness requirement is not met by the Mutual Agreement because the notes were transferred to the bank long before the parties entered the Mutual Agreement.

The district court concluded that the FDIC's interpretation of the statute, that section 1823 (e) (2) applies to "any asset acquired by it," was the correct view. Manatt tries to use the Mutual Agreement to defeat the FDIC's interest in notes that the FDIC purchased from Corning Bank. In this factual setting, the assets at issue—the assets that the FDIC is interested in and the assets that Manatt wants to avoid—are the seven promissory notes found in the bank's vault. Since the Mutual Agreement would diminish the FDIC's interest in assets it acquired, and the agreement was not executed at the same time Scott Manatt signed any of the original notes over to Corning Bank, that agreement does not comply with section 1823 (e) (2) and is not valid.

This interpretation may make accord and satisfaction inapplicable when the FDIC purchases a bank's assets, since parties can never reach an accord and satisfaction that compromises a debt at the same time they create an original debt obligation.[5] By enacting section 1823 (e), Congress was addressing the particular problem posed by the FDIC purchasing assets of a failed

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[5] This has particular application where a debtor attempts to reach an accord and satisfaction but fails to fully satisfy the terms of the accord before the FDIC takes control of a failing bank. This was the situation in Manatt's case. Manatt did not retrieve the notes from Corning, nor did Corning mark the notes "paid." In fact, because the Eagans received a discharge in bankruptcy for the $50,000 note, Manatt has never fully satisfied his obligations under the terms of the Collateral Agreement. I would also affirm the district court's ruling on accord and satisfaction.

bank and agreements that might be used to diminish or defeat the interest of the FDIC in the assets. While an accord and satisfaction in which a bank accepted assets worth $136,000 to extinguish a debt of $387,266 may be of substantial concern to the board of directors and stockholders of a bank with continuing vitality, when the bank fails and must be taken over by the government as insurer of the banks's depositors, public concerns then arise. I believe that the district court correctly applied the statute, and I would affirm its holding on this basis. The wisdom of the Act of Congress is an issue we do not consider.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY,

Plaintiff

v. No. J-C-87-53

SCOTT MANATT,

Defendant

ORDER

Before the Court are Motions for Summary Judgment filed by both parties. Extensive briefs have been filed over a period of several months, and the matter is now ripe for determination.

This case arises out of a dispute over the liability of defendant on certain promissory notes that were given to Corning Bank. FDIC contends that it ac-

quired the indebtedness totaling $316,531.76 due the bank when the Corning Bank closed on June 15, 1984. FDIC also contends that prior to the closing of the Bank, Manatt had conveyed certain items of collateral to the Bank, which were liquidated and sold, either by the Bank or by the FDIC, and the proceeds received thereon were applied in partial satisfaction of Manatt's indebtedness.

In its supplemental brief, FDIC cites the recent Supreme Court case of *Langley v. FDIC*, 108 S. Ct. 396 (1987) as being dispositive.

Manatt claims that he entered into a mutual agreement for liquidation of collateral on January 4, 1984, and that the execution of this document completely satisfied his indebtedness to the Bank. Manatt also raises issues of estoppel, res judicata and collateral estoppel, waiver and ratification.

In order for the agreement upon which defendant relies to be a valid defense in this case, the four requirements of 12 U.S.C. Section 1823(e) must be met. This statute provides:

> No agreement which tends to diminish or defeat the right, title, or interest of the Corporation in any asset acquired by it under this section, either as security for a loan or by purchase, shall be valid against the corporation unless such agreement (1) shall be in writing, (2) shall have been executed by the bank and the person or persons claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the bank, (3) shall have been approved by the board of directors of the bank or its loan committee, which approval shall be re-

> flected in the minutes of said board or committee, and (4) shall have been, continuously, from the time of its execution, an official record of the bank.

If any one of the four requirements of Section 1823(e) is shown to be unsatisfied, any side agreement between Manatt and the Bank is not enforceable against the FDIC. See *FDIC v. Gardner*, 606 F.Supp. 1484, 1488 (S.D. Miss. 1985). Section 1823 does not grant the court discretion to balance the equities in determining whether an agreement can be enforced. See *FDIC v. TWT Exploration Co.*, 626 F.Supp. 149, 156 (W.D. Okla. 1985).

The agreement which Manatt claims acts as an accord and satisfaction appears to have been executed on January 4, 1984. Section 1823(e)(2) requires that any such writing be executed contemporaneously with the acquisition of the asset by the bank. The "asset" at issue in the instant case is Manatt's indebtedness evidenced by the seven promissory notes. These notes were executed as early as December 1980. Prior to the decision in *Langley, supra*, the FDIC was ready to concede that a fact issue existed on the issue of whether or not the requirements of Section 1823(e) had been met. However, FDIC argues that the Court in *Langley* addressed the "contemporaneously" requirement, and thus resolved the issue in the case *sub judice*. In *Langley*, the Court stated that Section 1823(e) requires:

> [t]he 'agreement' not merely be on file in the bank's records at the time of an examination, but also have been executed and become a bank re-

> cord 'contemporaneously' with the making of the note. . . .

Id., 108 S.Ct. at 401.

These requirements ensure mature consideration of unusual loan transactions and prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. *Id.*

Manatt argues that Section 1823(e) is not even applicable since an accord and satisfaction was reached prior to the FDIC acquiring the assets of the bank, citing *FDIC v. Nemecek*, 641 F.Supp. 740 (D.Kan. 1986). Therefore, it is argued that the obligation on the notes was extinguished, and these "assets" being sued upon in this case were non-existent. Manatt further argues that even if Section 1823(e) is applicable, his agreement met the requirements of Section 1823(e) because it was contemporaneous with the acquisition by the Corning Bank of the assets conveyed by defendant.

In *Public Loan Company, Inc. v. FDIC*, 803 F.2d 82 (3rd Cir. 1986), the Court held that plaintiffs could not successfully assert the defense of oral accord and satisfaction against the FDIC because it did not meet the statutory requirements of Section 1823. Although this case involves the defense of written accord and satisfaction, it is clear that the statutory requirements of Section 1823 must nevertheless be satisfied when the defense of accord and satisfaction are raised.

Even though defendant takes issue with the applicability of *Langley* to this case, the Court nevertheless finds the language persuasive. The Court in *Langley*

clearly stated that the "agreement" must have been executed and become a bank record "contemporaneously" with the making of the note. As stated earlier, this requirement is to ensure mature consideration of unusual loan transactions by senior bank officials, and to prevent fraudulent insertion of new terms, with the collusion of bank employees, when a bank appears headed for failure. The Court finds that the "contemporaneous" requirement has not been met.

This holding precludes the necessity of discussing the other three requirements under the statute. The Court notes that it does appear that there may be a fact question as to whether the agreement was kept continuously as an official record of the bank. However, although a reference to a mutual agreement for liquidation was made in the minutes, the reference did not specifically refer to defendant's agreement. The Court questions whether this vague reference to an agreement would satisfy the requirement under the statute. See *FDIC v. Gardner*, 606 F.Supp. 1484, 1488 (S.D. Miss. 1985) (reference to the agreement must be specifically reflected in the minutes of the board or committee).

Even if the Court held that the requirements of Section 1823(e) were met, the Court would nevertheless find the FDIC is entitled to partial summary judgment because there was no valid accord and satisfaction, and, the FDIC is a holder in due course of Manatt's notes.

The general rule is that an accord and satisfaction may not result from the partial payment of a liquidated or undisputed claim. *Dyke Industries, Inc. v. Wal-*

drop, 16 Ark. App. 125, 697 S.W.2d 936 (1985). In the present case, it is clear that both parties knew exactly how much was owed by Manatt to the Bank, precluding the assertion of accord and satisfaction.

Furthermore, even if a valid accord and satisfaction had been reached, summary judgment in favor of the FDIC would still be appropriate, because it is a holder in due course under federal common law.

The FDIC was organized and exists pursuant to the laws of the United States, 12 U.S.C. Section 1811, *et seq.* Its primary function is to provide a system of insurance to stabilize or promote the stability of banks, protecting depositors of banking institutions from losses which would otherwise be occasioned upon the failure of such institutions. *First State Bank of Hudson County v. United States*, 599 F.2d 558 (3d Cir. 1979), *cert. denied* 444 U.S. 1013 (1980).

All banks which are members of the Federal Reserve System are required to be insured under the Act. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 209 F.2d 467, 473 (9th Cir. 1953).

When an insured bank becomes unable to meet its demand obligations, the FDIC may be appointed receiver. When a state bank is involved, as here, the FDIC may act in what has been termed a dual capacity. Under 12 U.S.C. Section 1821(e), the corporation is authorized to accept the appointment as receiver of a state bank. *FDIC v. Ashley*, 585 F.2d 157, 161 (6th Cir. 1978). With this appointment as receiver, the FDIC may enter into a purchase and assumption agreement with itself to allow the FDIC in what is termed its "corporate capacity"

to purchase assets of the insolvent bank and facilitate the acquisition of the acceptable assets of the insolvent bank by a bank in the geographical vicinity. Assets purchased by the FDIC in its corporate capacity are acquired pursuant to 12 U.S.C. Section 1823(e). The FDIC has been recognized as having broad powers to carry out its statutorily prescribed duties. See e.g., *Chatham Ventures, Inc. v. FDIC*, 651 F.2d 355 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982) ("The FDIC may exercise all powers specifically granted . . . , and such incidental powers as shall be necessary to carry out the powers granted.")

The federal courts have enunciated as a matter of federal common law a holder-in-due-course rule which is applicable to the FDIC when it acts in its corporate capacity. The Sixth Circuit Court of Appeals articulated this rule when it held that:

> [w]hen the FDIC in its corporate capacity, as part of a purchase and assumption transaction, acquires a note in good faith, for value, and without actual knowledge of any defenses against the note, it takes the note free of all defenses that would not prevail against a holder in due course.

FDIC v. Wood, 758 F.2d 156, 161 (6th Cir. 1985), *cert. denied*, 474 U.S. 944 (1985). *Accord Gunter v. Hutcheson*, 674 F.2d 862, 872 (11th Cir. 1982), *cert. denied*, 459 U.S. 826 (1982); *FDIC v. Leach*, 525 F.Supp. 1379, 1384 (E.D.Mich. 1981) (FDIC granted a status superior to that of a holder in due course).

Because of the great number of banks which have failed in recent years, many courts have faced

the same issues addressed in *Wood*. The consistent holding of these cases has been that the FDIC has holder-in-due-course status and is, therefore, shielded from the various defenses which are not ordinarily valid against a holder in due course. See *FDIC v. Armstrong*, 784 F.2d 741 (6th Cir. 1986) (as holder in due course the FDIC takes notes free from defenses of failure of consideration, fraud in the inducement, and material alterations); *FDIC v. Leach*, 772 F.2d 1262 (6th Cir. 1985) (State law defenses of usury and failure of consideration barred as a matter of federal common law); *FDIC v. Burger*, 631 F.Supp. 1141, 1144 (D.Kan. 1986); *FDIC v. Vestring*, 620 F.Supp. 1271, 1273 (D.Kan. 1985) ("personal" rather that "real " defenses ineffective as against the FDIC); *FDIC v. Galloway*, 613 F.Supp. 1392 (D.Kan. 1985); and *FDIC v. Ramsey*, 612 F.Supp. 326, 327 (D.Tenn. 1985).

Once it is established that the FDIC is a holder in due course, it becomes necessary to consider the effect of such legal status. A holder in due course generally takes free of "personal defenses," such as failure or lack of consideration, breach of warranty, unconscionability and fraud in the inducement. White and Summers, *Uniform Commercial Code*, Section 14-9, at 573 (1980). The only defenses which may be asserted against a holder in due course are those "real defenses," enumerated in Section 3-305(2). The only defense referred to therein which could conceivably encompass Manatt's claim of accord and satisfaction is the defense of "any other discharge of which the holder has notice when he takes the instrument." Section 3-305 (2)(e).

The FDIC cannot be charged with knowl-

edge of a defense merely because the information could be found in the bank's files. Actual knowledge must be shown as of the date the FDIC took the notes. *FDIC v. Wood, supra.*

Manatt has already stated in his Rule 29 statement of uncontroverted facts that the FDIC had at least constructive notice of his agreement when it came into possession of the Bank's records, and had actual notice when Manatt informed the FDIC's attorneys. Under either scenario the FDIC took the notes without actual notice of the agreement at the time it took the notes, and is entitled, therefore, to collect as a holder in due course. Regardless of whether a valid accord and satisfaction was entered into, such an agreement is simply not a defense to the FDIC as a holder in due course in the instant case.

Manatt asserts that the FDIC is estopped to deny the validity of the January, 1984 agreement. The court is persuaded by Plaintiff's arguments that estoppel cannot be asserted against the FDIC in this case. The Eighth Circuit has stated that it has not yet been held that the doctrine of equitable estoppel can be applied against the federal government. *McDermott v. United States*, 760 F.2d 879, 882 (8th Cir. 1985).

However, even if the Court were to hold the doctrine of equitable estoppel applicable, the defendant would have to show the traditional elements of estoppel and that the government engaged in "affirmative misconduct." *Green v. United States Dept. of Labor*, 775 F.2d 964, 970 (8th Cir. 1985). Defendant relies heavily on the fact that the FDIC had knowledge of the agreement at the time the real estate previously owned by defendant

was sold. Even assuming the facts as alleged by Manatt, there has been no showing of affirmative misconduct by FDIC. Even if FDIC agents had told Manatt they considered the agreement valid, this would not amount to affirmative misconduct. Furthermore, the defendant has failed to submit any documents which would indicate that the requirements in establishing estoppel set out in *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1217 (6th Cir. 1987) *cert. denied*, 108 S.Ct. 77 (1987), have been met. The FDIC has carefully set out the facts as alleged by the defendant, and the Court will not reiterate them here. Suffice it to say that even taking all of the defendant's allegations as true, they do not rise to the level required to establish estoppel.

The same policy reasons which support a finding that equitable estoppel cannot be applied as against the FDIC also support the conclusion that estoppel cannot be applied as against the FDIC also support the conclusion that estoppel by deed cannot be invoked against the FDIC.

In *DSI Corp. v. U.S.*, 655 F.2d 1072 (Ct. Cl. 1981), the Court of Claims considered a party's contention that the government was subject to estoppel by deed. The court reviewed the policy against applying estoppel by deed and concluded that it could not be invoked because of the danger that it would stand in the way of important public policy and might stifle government operations. *Id.* at 1077. Such reasoning is equally persuasive in the instant case.

Even if estoppel by deed could be invoked against the FDIC, estoppel by deed does not ordinarily

apply to the grantee. 28 Am. Jur. 2d *Estoppel and Waiver* Section 13. Manatt is apparently trying, therefore, to fit the FDIC into one of the exceptions to this general rule by arguing that the FDIC is somehow attempting to enjoy the benefits of Manatt's deed and at the same time reject its burdens.

It is true that a grantee may not make claims inconsistent with the valid provisions of a deed. However, the FDIC is not making any such inconsistent claims. Nowhere in the deed is it suggested that all of Manatt's debt is being forgiven. The FDIC is not trying to reject the burden of this deed. In fact, it has already given Manatt credit for the amount realized from the sale of his property. Rather, the FDIC is simply trying to prevent Manatt from parlaying the "burden" of his deed into a complete forgiveness of his substantial indebtedness to the Bank.

Nor is the Court persuaded by Manatt's arguments regarding *res judicata* and collateral estoppel. As stated by the FDIC, the elements of *res judicata* were set out as follows:

> The doctrine of *res judicata* bars a later suit when (1) the first suit resulted in a final judgment on the merits; (2) the first suit was based on proper jurisdiction; (3) both suits involved the same cause of action; and (4) both suits involved the same parties or their privies.

Lovell v. Mixon, 719 F.2d 1373, 1376 (8th Cir. 1983).

Clearly, the third requirement is not met. The instant action and the case to which Manatt would give *res judicata*

effect did not involve the same cause of action.

The Court in *Lovell, supra,* also set out the elements of collateral estoppel:

> Under the doctrine of collateral estoppel, four criteria must be met before a determination is conclusive in a subsequent proceeding: (1) the issue sought to be precluded must be the same as that involved in the prior litigation; (2) that issue must have been actually litigated; (3) it must have been determined by a valid and final judgment and (4) the determination must have been essential to the judgment.

Id.

The issue sought to be precluded is the validity of the agreement. A review of the documents shows that the issue in the case *sub judice* was not the same as that litigated in the *Ballenger* case, nor was it actually litigated in that case. It follows that the issue of the validity of the agreement was not determined by a valid and final judgment, nor was it essential or even relevant to the judgment in *Ballenger.* The fact that there is a sentence in the Decree of Foreclosure in *Ballenger*, stating that "No other deficiency shall exist" does not require a contrary result. As stated by FDIC, when that sentence is read in context, it is clear that it meant that no deficiency would exist on the debt owed to the Ballengers unless the court determined such a deficiency within thirty days after the foreclosure sale. The sentence quoted above had nothing to do with Manatt's debts to the FDIC.

Manatt also raises the affirmative defense

of waiver. A waiver is the voluntary and intentional relinquishment of a known right, claim or privilege. 28 Am. Jr. 2d *Estoppel and Waiver* Section 154.

The authority cited by Manatt makes it clear that public officers have no authority to waive enforcement of the law. *Id.* at Section 155. Since the FDIC is acting pursuant to a federal statute, it is clear that even if FDIC employees had intentionally relinquished claims against Manatt, it would not amount to a waiver.

Even if the FDIC could waive its claims against Manatt, such a waiver did not occur in this case. The party claiming a waiver must show that the person against whom the waiver is asserted had knowledge of the existence of its rights and intended to give up those rights. *American National Bank and Trust Company of Chicago v. K-Mart Corp.*, 717 F.2d 394 (7th Cir. 1983); *CBS, Inc. v. Merrick*, 716 F.2d 1292 (9th Cir. 1983); *Kistler v. Gingles*, 88 F.Supp. 9 (W.D. Ark. 1950).

None of the evidence presented by Manatt, even if assumed to be true for the purposes of this motion, even begins to suggest that the FDIC intentionally waived its claims against Manatt. The defense of waiver is clearly not applicable to the facts of this case.

The only issue which appears to remain in this case is whether the collateral turned over to the Bank and later sold was sold for a reasonable price. The FDIC concedes that Manatt is entitled to credit to his account the value of the collateral. They have already credited defendant's account with the amount realized from the sales. Manatt contends that the items were not sold for an amount equal to their value. The Court finds that this is-

sue should be resolved, either by agreement of the parties, or by a hearing.

Based upon the foregoing, the Court grants partial summary judgment in favor of the FDIC. The parties are directed to get together and try to agree upon an amount which represents the value of the collateral, and report to the Court the results of this meeting by no later than June 17, 1988. If this cannot be resolved, a hearing will be held.

The motion for partial summary judgment in favor of the FDIC is granted, the defendant's motion for summary judgment is denied.

ORDERED this 25th day of May, 1988.

ELSIJANE T. ROY
United States District Judge

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY Plaintiff

v. NO.J-C 87-53

SCOTT MANATT Defendant

JUDGMENT

The above action having come on for hearing before the Court and the issues having been duly heard and a decision having been duly rendered by Orders of the Court dated May 26, 1988 and June

IT IS HEREBY ORDERED AND ADJUDGED that:

1. Plaintiff Federal Deposit Insurance Cor-

poration have judgment against and recover of and from the defendant Scott Manatt the sum of Five Hundred Four Thousand Five Hundred Ninety-four and 33/100 Dollars ($504,594.33), which represents the principal amount owed plus interest through June 22, 1989, with interest from the entry of judgment at the rate of 8.16% per annum, as provided by law, and its costs of action.

2. Plaintiff Federal Deposit Insurance Corporation shall, upon at least five days' notice, deliver to defendant at the offices of the FDIC's counsel, the painting which is the subject of the defendant's replevin claim.

ORDERED this 10th day of July, 1989.

Memorandum

COUNT	PRINCIPAL	INTEREST	COUNT TOTAL	GRAND TOTAL
1.	$439,000.00	$36,270.00	$75,270.00	
2.	3,321.92	2,147.87	5,469.79	
3.	2,514.65	2,161.15	4,675.80	
4.	2,800.00	2,401.40	5,201.40	
5.	154,967.49	129,077.30	284,044.79	
6.	68,569.52	55,008.72	123,578.24	
7.	3,593.65	2,760.66	6,354.31	
				$504,594.33

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

FEDERAL DEPOSIT INSURANCE CORPORATION,
IN ITS CORPORATE CAPACITY, Plaintiff

vs. No. J-C-87-53

SCOTT MANATT Defendant

ORDER

Before the Court is plaintiff's motion to dismiss the counterclaim. In his counterclaim, defendant claims that on or about January 1, 1983 he purchased a valuable oil painting entitled the "Battle of Chickamonga" for $25,000.00. He also purchased a knife purportedly worn by General George Custer at the engagement at the Little Big Horn for the sum of $10,000.00. Defendant contends that they were purchased with a check in the amount of $35,000.00 and proceeds of that check were immediately paid by SLM, Inc. to the Corning Bank. It is alleged that when the FDIC took over the Corning Bank, it appropriated and continues to hold the painting which is property of the defendant. Defendant asks that the Court enter its order of replevin granting possession to defendant of the oil painting. Defendant also asks for incidental damages in connection with the replevin. In the event the painting has been disposed of or damaged, defendant contends conversion has occurred and seeks damages as a result of the conversion.

In the Motion to Dismiss the Counterclaim, plaintiff contends that the Court lacks subject matter jurisdiction over the counterclaim and the counterclaim

fails to state a claim upon which relief can be granted. It is FDIC's position that subject matter jurisdiction is lacking under the Federal Tort Claims Act and that the defendant failed to submit an administrative tort claim.

In his response, defendant claims that replevin does not sound in tort, and therefore the FTCA does not apply to bar the claim. As to the other claims, Manatt claims they are not barred by the FTCA because they are counterclaims in recoupment, arising out of the same occurrence.

In FDIC's reply, FDIC explains that if the replevin counter claim is seeking only possession of the painting, the plaintiff will allow that the Court may have jurisdiction directly against the FDIC under its sue and be sued statute, 12 U.S.C. §1819 (4). However, FDIC claims that any money damages he seeks must lie under the FTCA. It is further argued that the counterclaims arise out of a separate transaction and involve different parties than the primary claim and, therefore, the FTCA still applies. The Court finds the FDIC's arguments persuasive. With respect to defendant's request for possession of the painting, the Court will allow the claim directly against the FDIC under 12 U.S.C. §1819 (4). To the extent that defendant seeks money damages, the Court finds that the FTCA is the exclusive remedy. It is axiomatic that the United States may not be sued for money damages except as it has consented to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Melo v. United States*, 505 F.2d 1026, 1028 (8th Cir. 1974). The exclusive remedy for claims in tort against a federal agency, including the FDIC is the Federal Tort Claims Act, which permits only

monetary relief. 28 U.S.C. §1346(b). *Segarra Ocasio v. Banco Regional de Bayamon*, 581 F.Supp. 1255 (D.C. Puerto Rico 1984). A review of defendant's counterclaim leads the Court to conclude that the money damages sought in connection with the replevin action and the conversion theory sound in tort, and therefore fall within the scope of the FTCA. The basis for the damages incidental to the replevin is the wrongful taking and withholding of the property, which is a tort concept. See e.g., *Hixion v. Deering*, 249 Ark. 701, 460 S.W.2d 748 (1970). These claims clearly may only be brought against the United States directly under the FTCA, notwithstanding the FDIC's sue and be sued clause. See, 28 U.S.C §2679(b). *Safeway Portland E.F.C.U. v. FDIC*, 506 F.2d 1213, 1215 (9th. Cir. 1974); *EMCH v. United States*, 474 F.Supp. 99 (E.D. Wisc. 1979), *aff'd* 630 F.2d 523 (7th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). In a suit brought pursuant to the Federal Tort Claims Act, the only party defendant is the United States. *Emch, supra.*

Based upon these holdings, to assert the claims, defendant must not only have sued the United States, but also have filed an administrative claim prior to bringing the suit. 28 U.S.C. §2675 (a). Since he has not done so thus far, he is barred from bringing this action. This applies equally to his claim for punitive damages and interference with contract rights. 28 U.S.C. §2674 and §2680 (h).

Nor is the Court persuaded by defendant's argument that the counterclaims are in recoupment. As in *FDIC v. Shinnick*, 635 F.Supp. 983 (D. Minn. 1986), the real dispute centers on whether defendant's tort counter

claims qualify as responsive counterclaims for recoupment or separate claims which may be brought only in conformance with the FTCA. In *Frederick v. United States*, 386 F.2 481, 488, (5th Cir. 1967), the Court laid out the requirements for a claim of recoupment. The claim must (1) arise from the same transaction or occurrence as the government's suit, (2) seek relief of the same kind or nature, and (3) seek an amount not in excess of the government's claim. Id. at 488

In the case sub judice, the return of the painting had nothing to do with the note collection, for which the painting is not collateral. Furthermore, defendant's claims for "punitive damages" and attorney's fees are clearly not in recoupment to the collection action by the FDIC on the notes. Defendant relies on Frederick in support of his argument. However, even in Frederick, the Court held that the government does not go so far as to waive its immunity to a claim which is different in kind from that sought in its pleadings. In Frederick, the counterclaim brought to issue the amount of money which should be credited to the defendant on the note. In this case, the counterclaim asserted in tort for conversion and interference with contract rights. The district court in FDIC v. Shinnick, supra, dismissed a tort counterclaim against the FDIC when collecting on a note, holding that the tort was independent to the FDIC's collection note. Id., 635 F.Supp. at 985. The Court finds the same conclusion should be drawn in this case.

Therefore, except as to the claim for possession of the painting, the allegations contained in the counterclaim are dismissed.

ORDERED this 25th day of May, 1988

MUTUAL AGREEMENT FOR LIQUIDATION OF COLLATERAL

Whereas, the undersigned debtor is indebted to the Corning Bank in an amount hereinafter set out based on Promissory Notes as hereinafter identified, which indebtedness is secured by a first lien on the collateral hereinafter set out; and

Whereas, the debtor desires to pay such indebtedness but does not have the cash funds immediately available to pay such indebtedness and is willing to effect a transfer to the Corning Bank of a merchantable title to all such collateral free and clear of all liens, claims and encumbrances in satisfaction of the indebtedness owed by the debtor to the Corning Bank.

EXHIBIT B

DESCRIPTION OF NOTES AND COLLATERAL:

NUMBER	DATE	ORIGINAL PRINC. AMT.	PRESENT PRINC. BAL.
506-1200-02	3/6/81	$11,009.00	10,321.92
506-1200-18	12/15/80	475,000.00	60,000.00
506-1200-14	10/14/83	72,405.36	72,405.07
506-1200-07	11/12/82	2,514.65	2,514.65
506-1200-12	11/17/82	2,800.00	2,800.00
506-1200-10	4/22/83	154,967.49	154,967.49
506-1200-13	6/23/83	68,569.52	68,569.52

One 1966 Cherokee Piper PA28-140-4;

Registrations Number N8469R; Serial Number 28-22374.

Real Estate Mortgage dated December 15, 1980, recorded in Record Book 57, page 685 of the records of the Western District of Clay County, Arkansas, covering all of Block 5 in Manatt's Second Addition to the City of Corning Arkansas.

Promissory note dated April 4, 1980, in the principal sum of $50,000.00 from Leon Eagan and Betty J. Eagan to Scott Manatt and Sharon Manatt secured by a Real Estate Mortgage from Leon Eagan and Betty Eagan to Scott Manatt and Sharon Manatt dated April 4, 1980, recorded in record book 56, page 993 of the records of the Western District of Clay County, Arkansas, which Promissory Note and Real Estate Mortgage have been assigned by Scott Manatt and Sharon Manatt to the Corning Bank by Assignment dated January 5, 1983.

The debtor shall immediately convey to the Corning Bank merchantable title to the above described collateral free and clear of the liens, claims and encumbrances of any other parties. The cancellation of the indebtedness owed the Corning Bank shall not occur until and shall be contingent upon evidence satisfactory to the bank of the current ownership of the collateral by the debtor and the right and authority of the debtor to convey such collateral free and clear of all right, title, interest, liens, claims and encumbrances of any and all other parties.

Subject to note and mortgage payable to Gay Ballenger with a principal balance of $13,000.00, recorded in book — page— .

Dated this 5th day of January, 1984.

CORNING BANK
By JAMES D. MANATT, President

ATTEST:
By DORIS SIMPSON

SCOTT MANATT, Debtor

SHARON MANATT, ~~Debtor~~[6]

[6] The word "Debtor" following Sharon Manatt's signature was interlined before she signed.